Google Inc. et al v. Egger et al Doc. 424

Jon B. Eisenberg, California Bar No. 88278 (jon@eandhlaw.com
William N. Hancock, California Bar No. 104501 (bill@eandhlaw.com)
Eisenberg & Hancock LLP
1970 Broadway, Suite 1200 • Oakland, CA 94612
510.452.258l – Fax 510.452.3277

Steven Goldberg, Oregon Bar No. 75134 (steven@stevengoldberglaw.com)
River Park Center, Suite 300 •' 205 SE Spokane St.• Portland, OR 97202
503.445-4622 – Fax 503.238.7501

Thomas H. Nelson, Oregon Bar No. 78315 (nelson@thnelson.com)
P.O. Box 1211, 24525 E. Welches Road • Welches, OR 97067
503.622.3123 - Fax: 503.622.1438

Zaha S. Hassan, California Bar No. 184696 (zahahassan@comcast.net)
7180 Hazel Fern Rd.• Portland, OR 97224
360.213.9737 - Fax 866.399.5575

J. Ashlee Albies Oregon Bar No. 05184 (ashlee@albieslaw.com)
River Park Center, Suite 300 • 205 SE Spokane St.• Portland, OR 97202
503.963.3751 – Fax 503.238.7501

Lisa R. Jaskol, California Bar No. 138769 (ljaskol@earthlink.net)
610 S. Ardmore Ave.• Los Angeles, CA 90005
213.385.2977 – Fax 213.385.9089

Attorneys for Plaintiffs Al-Haramain Islamic Foundation, Inc., Wendell Belew and Asim Ghafoor

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*, Plaintiffs, v. **GEORGE W. BUSH**, *et al.*, Defendants.	)	MDL Docket No. 06-1791 VRW **CASE MANAGEMENT CONFERENCE: FEB. 7, 2008** **SUPPLEMENTAL CASE MANAGEMENT STATEMENT AND [PROPOSED] ORDER**

Dockets.Justia.com

Plaintiffs Al-Haramain Islamic Foundation, Inc., Wendell Belew, and Asim Ghafoor respectfully request permission to submit this belated Supplemental Case Management Statement and Proposed Order for the case management conference scheduled in the above-entitled case on Feburary 7, 2008, and request the Court to adopt it as a Supplemental Case Management Order in this case.

SUPPLEMENTAL CASE MANAGEMENT STATEMENT

The Ninth Circuit has remanded this case for this Court "to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1206 (9th Cir. 2007).

Additionally, currently pending before this Court is Plaintiffs' Motion for Partial Summary Judgment of Liability or, Alternatively for Partial Summary Adjudication of Specific Issues Within Claims, which plaintiffs filed in the Oregon district court on October 30, 2006. On March 13, 2007, this Court ordered defendants to file opposition and scheduled the motion for oral argument. The Ninth Circuit, however, stayed those proceedings during the pendency of the appeal. Now that the appeal has been decided, the Ninth Circuit's stay is lifted and the proceedings on the motion may recommence if this Court finds that FISA preempts the state secrets privilege and permits this litigation to go forward. This Court's decision on the pending motion is within the scope of the Ninth Circuit's remand for "proceedings collateral" to the determination whether FISA preempts the state secrets privilege, 507 F.3d at 1206, because a decision on the motion is the inevitable consequence of – and thus collateral to – a determination that FISA preempts the privilege.

Plaintiffs propose that this Court decide the remanded FISA preemption issue within the procedural context of the pending summary judgment/adjudication motion. Plaintiffs propose to submit an amended memorandum in support of the pending motion, incorporating into a single document plaintiffs' arguments on the preemption issue, plaintiffs' prior arguments on the motion, and several new matters that have occurred since the filing of the original motion. If the Court decides that FISA preempts the state secrets privilege, the Court can immediately proceed to the collateral matters and determine (1) plaintiffs' standing, by reference to public information and by *in camera* and *ex parte* review of the sealed document filed with the complaint as prescribed by FISA, 50 U.S.C. § 1806(f), and (2) the legality of the challenged warrantless surveillance program, which raises purely legal issues.

Proceeding in this manner – with this Court deciding all pending issues (including FISA preemption, standing, and the legality of the warrantless surveillance program) on plaintiffs' amended motion – will avoid literally years of delay that would otherwise result from consecutive decisions on the various issues and the multiple attendant interlocutory appeals that would likely be sought from each decision.

Plaintiffs are prepared to file their amended memorandum forthwith, along with a declaration containing additional exhibits on the new matters that have occurred since the filing of the original motion. Plaintiffs anticipate that the amended memorandum will be approximately 45 pages in length; plaintiffs thus respectfully request permission to exceed the 25-page limit prescribed by Northern District of California Civil Local Rule 7-2(b).

Plaintiffs are informed that plaintiffs' counsel in the *Hepting* litigation wish to file a brief as amicus curiae, and that other counsel in the MDL proceedings might also wish to do so. We therefore propose a briefing schedule that includes the filing of amicus curiae briefs and answers thereto.

Plaintiffs propose the following briefing and oral argument schedule:

- Plaintiffs' amended memorandum and declaration due February 15, 2008.
- Defendants' opposition due March 14, 2008
- Plaintiffs' reply and amicus curiae briefs due March 21, 2008
- Answers to amicus curiae briefs due March 28, 2008
- Oral argument April 10, 2008.

On January 29, 2008, plaintiffs' counsel conferred by telephone with defense counsel Anthony Coppolino regarding plaintiffs' proposal for combined briefing and decision of the FISA preemption issue and the pending motion. Mr. Coppolino said he would consider the proposal, but he has not yet responded to plaintiffs' counsel.

Plaintiffs therefore request the Court to make the following Supplemental Case Management Order.

Dated: February 4, 2008 /s/ Jon B. Eisenberg
Jon B. Eisenberg

SUPPLEMENTAL CASE MANAGEMENT ORDER

The Supplemental Case Management Statement and Proposed Order is hereby adopted by the Court as a Supplemental Case Management Order for the case and the parties are ordered to comply with this Order.

Dated: _________________

____
Chief Judge Vaughn R. Walker

PROOF OF SERVICE

RE: ***Al-Haramain Islamic Foundation, Inc. v. George W. Bush, et al.***
MDL Docket No. 06-1791

I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is Eisenberg and Hancock, LLP, 180 Montgomery Street, Suite 2200, San Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner indicated on the below named parties and/or counsel of record:

- **SUPPLEMENTAL CASE MANAGEMENT STATEMENT AND [PROPOSED] ORDER**

___ **Facsimile** transmission from (415) 544-0201 during normal business hours, complete and without error on the date indicated below, as evidenced by the report issued by the transmitting facsimile machine.

___ **U.S. Mail**, with First Class postage prepaid and deposited in a sealed envelope at San Francisco, California.

XX **By ECF:** by USDC Live System-Document Filing System on all interested parties registered for e-filing.

I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service, and said correspondence would be deposited with the United States Postal Service at San Francisco, California that same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 2008 at San Francisco, California.

/s/ Mary B. Cunniff
MARY B. CUNNIFF